

**TENNESSEE DEPARTMENT OF REVENUE
LETTER RULING # 04-18**

WARNING

Letter rulings are binding on the Department only with respect to the individual taxpayer being addressed in the ruling. This presentation of the ruling in a redacted form is informational only. Rulings are made in response to particular facts presented and are not intended necessarily as statements of Department policy.

SUBJECT

Application of the Tennessee sales and use tax to screening and materials used for analysis of consumer's potential for heart disease or stroke.

SCOPE

This letter ruling is an interpretation and application of the tax law as it relates to a specific set of existing facts furnished to the department by the taxpayer. The rulings herein are binding upon the Department and are applicable only to the individual taxpayer being addressed.

This letter ruling may be revoked or modified by the Commissioner at any time. Such revocation or modification shall be effective retroactively unless the following conditions are met, in which case the revocation shall be prospective only:

- (A) The taxpayer must not have misstated or omitted material facts involved in the transaction;
- (B) Facts that develop later must not be materially different from the facts upon which the ruling was based;
- (C) The applicable law must not have been changed or amended;
- (D) The ruling must have been issued originally with respect to a prospective or proposed transaction; and
- (E) The taxpayer directly involved must have acted in good faith in relying upon the ruling; and a revocation of the ruling must inure to the taxpayer's detriment.

FACTS

[THE TAXPAYER] has developed an integrated vascular disease screening called [THE TEST], for which it has applied for a patent. [THE TEST] is performed at designated locations within [RETAIL STORES] in Tennessee. The Taxpayer's technicians use [A MACHINE] to analyze a customer's arteries for blockage. They also measure blood pressure and pulse, and calculate body mass. The results of the procedures are presented to customers in a single page format in the form of a printout as well as on a digital disk. The technician also provides the customer with a [BOOK] that enhances the customer's understanding of the [THE TEST] results, for which there is no separately stated charge. The Taxpayer purchases these books from a vendor for distribution to the Taxpayer's customers. The Taxpayer charges the customer a flat fee for its services, the related printout and electronic copy of the test results, and the book.

QUESTIONS

1. Is the fee charged by the Taxpayer to the consumer subject to Tennessee sales and use tax?
2. Are the Taxpayer's purchases of tangible personal property used to provide its service subject to sales and use tax?

RULING

1. No. The fee is payment for a service that is not subject to sales and use tax.
2. Yes. The Taxpayer is required to pay sales or use tax on the purchase of the materials utilized in the screening program. The tax base is the purchase price of the materials.

ANALYSIS

The Tennessee Retailers' Sales Tax Act levies a tax on the sale of each item or article of tangible personal property sold at retail in this state. Tenn. Code Ann. § 67-6-202. A "sale at retail" means "a taxable sale of tangible personal property...to a consumer or to any person for any purpose other than resale." Tenn. Code Ann. § 67-6-102(a)(25)(A). The "sales price" of an item or article means "the total amount for which a taxable service or tangible personal property is sold, including any services that are a part of the sale of tangible personal property . . ." Tenn. Code Ann. § 67-6-102(a)(28).

Certain specifically enumerated services performed in Tennessee are also subject to the tax. Tenn. Code Ann. § 67-6-205. Furthermore, even services that are not specifically enumerated as taxable can become subject to tax if they are performed as a part of a taxable sale of tangible personal property. Tenn. Code Ann. § 67-6-102(a)(28); *Thomas Nelson, Inc. v. Olsen*, 723 S.W.2d 621 (Tenn.1987).

Based on the foregoing, the fee charged by the Taxpayer will be subject to Tennessee's sales and use tax only if the services that generate the fees are either specifically taxable in accordance with Tenn. Code Ann. §§67-6-102(a)(25)(F) and 67-6-205, or are taxable as services that are part of the sale of tangible personal property in accordance with Tenn. Code Ann. §§67-6-102(a)(28) and 67-6-202.

In *Thomas Nelson*, the Supreme Court upheld the imposition of sales tax on transactions involving services which would have been nontaxable were it not for the transfer of tangible personal property to the customer. The Court held that models transferred to the customers were a crucial element of the contract, without which the otherwise nontaxable portion of the contract could not have been performed, and not just incidental by-products of the otherwise nontaxable service. In reaching its conclusion, the Court reviewed two earlier cases, *Crescent Amusement Co. v. Carson*, 213 S.W.2d 27 (Tenn. 1948) and *Commerce Union Bank v. Tidwell*, 538 S.W.2d 405 (Tenn. 1976). In *Crescent*, the Court upheld the imposition of sales tax on the rental of motion picture film to theaters. The Court rejected the taxpayer's argument that the rental payment was for a nontaxable license, because the film was the only means by which the license could be utilized. *Commerce Union*¹ involved the sale of computer software. The Court considered the software to be information which was transferred to the customer via punch cards, tapes or discs. The software was frequently accompanied by manuals. The Court held that the tangible personal property provided to the customer was incidental to the total purchase and was not a sale of tangible personal property.

The service provided by the Taxpayer is not specifically listed as a taxable service under Tenn. Code Ann. § 67-6-102(a)(25)(F), nor is it part of a sale of tangible personal property. Therefore, the service is not subject to sales and use tax. The printout and digital copy of the results, as well as the book, are incidental to the service being performed. The charge is not for these materials but rather is for the screening process. Thus, the fee charged by the Taxpayer is not subject to sales and use tax.

Because the Taxpayer is not selling the printouts or digital copies, the purchase of the materials needed to produce these (paper, ink, etc.) are sales at retail, as defined in Tenn. Code Ann. § 67-6-102(a)(25)(A), and the vendor should collect sales tax on the sales price of these items. Likewise, the purchase of the instruction books provided by the Taxpayer to the consumer is subject to sales tax. Pursuant to Tenn. Comp. R. & Regs. 1320-5-1-.68(3), the Taxpayer should not purchase these with a resale certificate. If these items are purchased from vendors who do not collect sales tax from the Taxpayer, the Taxpayer is required to remit use tax on the cost of these materials as provided in Tenn. Code Ann. §§67-6-203 and 67-6-210.

Note: Although the Taxpayer did not request a ruling regarding the [THE MACHINE] or other equipment used for the screening, this equipment would be subject to sales and use tax when purchased in the same manner as the instruction books and other materials.

¹ Software was subsequently defined as tangible personal property. Tenn. Code Ann. § 67-6-102(a)(27)(B).

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APPROVED: Loren L. Chumley
Commissioner

DATE: 7/14/04